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No. 87-1258, 87-1319

FILED

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In The

Supreme Court of the United States

October Term, 1988

ALLEGHENY PITTSBURGH COAL COMPANY,
Petitioner,

v.

COUNTY COMMISSION OF WEBSTER COUNTY, WEST VIRGINIA,
Respondent.

EAST KENTUCKY ENERGY CORPORATION, ONEIDA COAL COMPANY, INC., and SHAMROCK COAL COMPANY, INC.,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Writs of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

I.

Should this court review as a substantial equal protection federal question, a state ad valorem tax case in which the State Supreme Court decided, on a record insufficient to support any other finding, that there was no intentional and systematic discrimination?

II.

Does the equal protection clause of the Fourteenth Amendment relieve petitioner-taxpayer of its duty to pay ad valorem taxes on property which has been accurately assessed substantially higher than surrounding property, when the increase in petitioner's valuation reflects actual differences between petitioner's property and surrounding property?

III.

Does the Equal Protection Clause require a county tax assessor to ignore her statutory duty to utilize the sales price of all recently sold tracts during her annual reassessment unless she automatically alters the assessed value of all tracts within some arbitrary radius of each recently sold tract?

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STATEMENT OF THE CASE

The petitioners' argument rests upon the assertion that the coal companies own "homogeneous" tracts of 7374 acres and 7783 acres which possess average assessed values of $2,043 and $376.95 per acre, respectively. Petitioners then use these "*average*" values for their "homogeneous" tracts and compare them to assessments on other "comparable" property in Webster County. (Pet. Br. p. 9) Petitioner East Kentucky failed to disclose to the Court that its "homogeneous" tract of 7347 acres is comprised of nineteen (19) tracts that have assessed values varying from a low of $300.07 per acre to a high of $4,967.74 per acre. Petitioner Oneida failed to disclose that its "homogeneous" contiguous tract of 7783 acres consists of six tracts that have assessed values varying from a low of $50.00 per acre to a high value of $560.00 per acre.[1]

It is not disputed that there is a great variance in the valuation of coal properties generally. In fact, there is considerable variation not only between petitioners' properties but within each petitioner's tracts.

In 1974 Allegheny Pittsburgh purchased the property that comprises its 7374 acres for a total of $24 million. This property was resold to Eastern Kentucky Energy in 1982 for $30 million. The tracts which make up the 7374 acres, the assessed valuation, and the assessed valuation per acre are:

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[1]The assessed value per acre is arrived at by dividing the number of acres into the assessed valuation. In the event of percentage ownership of the property, the result described above is multiplied by the percentage of ownership.

Tract	Assessed Valuation
83.5 Acres Minerals	$ 5,500.00
4,287 Acres Fee Less O & G	13,300,580.00
620 Acres Coal	238,700.00
35.5 Acres Fee	19,360.00
1,335 Acres Fee	719,260.00
21.5 Acres Fee	11,860.00
3.75 Acres Fee	8,470.00
1.5 Acres Surface	2,370.00
1.75 Acres Surface	4,620.00
0.31 Acres Surface	1,540.00
2.36 Acres Fee	6,930.00
100 Acres Coal	34,560.00
540 Acres Fee	436,590.00
82.48 Acres Surface	24,750.00
100 Acres Minerals	34,560.00
48.5 Acres Surface	22,180.00
5.1 Acres Less Coal	1,390.00
25 Acres Less Minerals	12,010.00
12.75 Acres Minerals	5,540.00

In 1977 Oneida Coal purchased its 7783 acres for $5.9 million. The six tracts which comprise this 7783 acres, its assessed value and the assessed value per acre are:

Tract	Assessed Valuation
3700 Acres Coal	$1,394,710.00
1/2 int. 44.41 Acres & 2/3 Min.	8,400.00
15.0 Acres	8,400.00
1/2 int. 15 Acres Surface	8,400.00
870 Acres	43,500.00
4083 Acres Coal	1,539,090.00

The parcel of property that skews the average for Eastern Kentucky is the 4287 acres with the assessed value of $13,300,500 or $3,102.52 per acre. The reason for the extreme value of this property relates to the existence of 32,000,000 tons of coal within a 1500-acre conglomeration of tracts which can be recovered by the least expensive mining method available in West Virginia, strip mining. (Tr.—Feb. 12, 1985 Hearing, Before the Co. Comm. pp. 91-97)

It is not disputed that the Assessor of Webster County uniformly assessed all property at the appropriate percentage of its appraised value. It is not disputed that the Assessor of Webster County uniformly revalued transferred property based upon the declaration of value filed at the time of transfer. Nor is it disputed that between 1975 and 1986 the Assessor of Webster County raised the assessed values on all properties that had not undergone recent transfers by 33.1 percent, *i.e.*, a 10 percent increase in 1976, a 10 percent increase in 1981, and a 10 percent increase in 1983, with a cumulative effect of a 33.1 percent increase.

No evidence was presented as to the market conditions applicable to the adjoining tracts or as to the proven reserves upon those tracts. The only evidence in the record as to the "true and actual value" of the adjoining tracts is the assessed valuation of the adjoining tracts as contained within the taxing books for Webster County, West Virginia. The trial court never made any finding as to the true and actual values of the adjoining tracts.

On July 17, 1987, the Supreme Court of Appeals of West Virginia upheld the Board of Equalization and Review and reversed the circuit court, holding that no disparate treatment occurred and that the uniform use of

recent deed values as the basis for appraising property subject to ad valorem taxation does not violate either the equal and uniform provision of the West Virginia Constitution or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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ARGUMENT

I. THE INSTANT CASE DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION, AND THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS BEING IMPROVIDENTLY GRANTED.

A. Factual Finding By State Court Negates Federal Question.

The only federal quesion asserted in petitioner's brief in the case at bar is whether the *application* of a state statute in a particular case by a local taxing authority was violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (Pet. App. p. 2).

Although a federal question has been raised, it is this Court's duty to dismiss the Writ of Certiorari if the question presented is not *substantial* in nature. *Sugarman v. United States,* 249 U.S. 182 (1919); *Zucht v. King,* 260 U.S. 174 (1922).

The West Virginia Supreme Court of Appeals reviewed the conflict of evidence and found that:

> The record does not support the trial court's ruling that the actions of the Assessor and board of review constitute 'intentional and systematic' discrimination. The assessments based upon the price paid for the property in arm's length transactions are an appropriate measure of the 'true and actual value' of appellee's [petitioner's] property. (Pet. App. p. 7a)

This factual finding by the State court in review of the facts is conclusive.

> [A]ll those matters which are usually termed issues of facts are for conclusive determination by the State courts and are not for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scrupple. *Watts v. Indiana,* 338 U.S. 49, 50 (1940).

The finding by the State court negates the existence of any *substantial* federal question under the Equal Protection Clause. An essential requirement to invoke the protection of the Fourteenth Amendment is that the discrimination must be *intentional and systematic. Southern Railway Co. v. Watts,* 260 U.S. 519 (1923). The review of the facts by the State court and the resolution of the conflict of evidence in finding no intentional and systematic discrimination is fatal to jurisdiction.

B. Record is Inadequate to Present and Decide the Federal Question.

As was noted in the Statement of Facts, taxpayer/petitioners never presented any evidence that the true and actual value of the adjoining "comparable" tracts was other than the value from which the assessed value included by the assessor in the land book was based. There never was, nor on the record below could there be, any finding that the adjoining tracts were undervalued, and if so, by what amount. *Sioux City Bridge Co. v. Dakota*

Co., 260 U.S. 441 (1923), cited and relied upon heavily by petitioners, pointed out the necessity for a determination of all necessary predicate facts and remanded for that purpose. This case is distinguishable, in that here a full hearing was held in which the petitioners failed to present sufficient evidence to meet their burden of proof and the Supreme Court of Appeals of West Virginia, in its decision, so found, in that the record did not support the trial court's findings. (Pet. App. p. 8a) The petitioner's own expert, Ronald Mullanex had to concede that he had no knowledge of proven mineral reserves on the other "comparable" property. A tract with proven reserves of 32,000,000 tons of coal that can be strip mined is far more valuable than a similar number of acres with *no* proven reserves. The West Virginia Supreme Court correctly recognized that this evidence could not support a finding of intentional and systematic discrimination.

Accordingly, it would be appropriate for the Supreme Court to find in the absence of evidence of undervaluation and in view of the inadequacy of the evidence of comparability of the adjacent properties, the record does not present a substantial Federal question to this Court.

II. THE ASSESSOR'S ACTIONS IN VALUING PETITIONER'S PROPERTY DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

A. Standard of Review

The Court accords great leeway toward methods used by taxing officials in determining whether property valuations for taxation purposes violate the Equal Protection Clause. It will not intervene merely on the ground of a mistake in judgment on the part of the officer to whom the

law entrusted the duty of assessment. *Coulter v. Louisville & Nashville R.R. Co.*, 196 U.S. 599 (1905). There must be something more. *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350 (1918). The violation must be occasioned by an improper execution of the taxing statute that amounts to intentional and systematic discrimination by the taxing official. *Id.* at 350.

As noted in *Coulter*, although there is a natural inclination to believe that undervaluation of others' properties is probable when suggested, such undervaluation must be proven. In *Coulter*, a taxpayer contended that it was denied equal protection of the laws in that it was taxed at fair cash value in accordance with the laws of Kentucky, while there was a uniform and general undervaluation of other property. The Court declined to find discrimination as it could not find clear evidence concerning the appropriate valuations and would not intervene merely on the grounds that there was a mistake in judgment.

Proof of an unequal assessment is not enough to result in a finding that there is a violation of the Equal Protection Clause. Every taxation system necessarily results in some inequality. See *May Department Stores v. State Tax Comm'n*, 308 S.W.2d 748 (1958). What must be proven is that such inequality is caused by an intentionally adopted discriminatory system, not merely a system where an evaluation scheme results in imperfect assessments.

In applying these standards, the good faith of the taxing official is presumed. *Southern Railway Co. v. Greene*, 216 U.S. 400 (1910). Further, the Court has recognized that actions of an assessor are to be evaluated

in light of the particular circumstances surrounding the assessor's evaluation. In *Sunday Lake,* the Court addressed the question of whether a tax assessor who assessed a piece of property at full value, while property was generally assessed at not exceeding one-third of its actual worth, violated the Equal Protection Clause. The Court found that the action was not incompatible with an honest effort in new and difficult circumstances to adopt valuations not relatively unjust or unequal. In so holding, the Court recognized that at the time of the valuation there was insufficient evidence before the board to justify immediate and general revaluations.

The deferential treatment accorded to taxing officials is essential to reviewing property tax evaluations for Equal Protection Clause purposes. Failure to apply a tolerant and flexible standard to valuation decisions would result in an abundance of litigation because valuation is an inexact science and unavoidably results in some inequality. At stated in *Supervisor of Assessments, etc. v. Southgate Harbor,* 279 Md. 586, 369 A.2d 1053 (1977), quoting from *State Tax Comm'n v. C. & P. Tel. Co.,* 193 Md. 222, 66 A.2d 477, 482 (1949), the court noted:

> Valuation of property for taxation is one of the oldest forms of administrative power and the courts should not interfere with the exercise of this administrative power unless it is unlawful, unreasonable, or against the substantial weight of the evidence. Perfect equality is unattainable. If assessment could be upset by comparison of a few widely different properties, on the basis of a selected few of the many elements or evidences of value, no assessment could stand.

Id. at 1057.

The cause now before the Court represents the very essence of those concerns which have consistently motivated the Court to adopt a deferential standard in reviewing taxing statutes under the Equal Protection Clause of the Fourteenth Amendment. The cause before the Court results from the local assessor's compliance with the requirements of a statutory assessment scheme that has been found by this Court to be constitutional. See *Charleston Fed. Sav. & L. Ass'n v. Alderson,* 324 U.S. 182 (1944). When examined in light of the circumstances, the assessor's evaluation will not be found violative of the Equal Protection Clause.

B. The Increase In Petitioner's Valuation Reflects Differences Between The Petitioner's Property And Surrounding Property.

The assessor's valuation of petitioner's property did not constitute a violation of the Equa! Protection Clause because the valuation was merely a reflection of the uniqueness of petitioner's property when compared to surrounding properties. Such action does not constitute unequal treatment. Ultimately, this Court is being enticed to find an equal protection violation based solely on the fact that taxes have risen "dramatically" on petitioners' property. The evidence presented by the petitioners fails to prove that there are *any* other properties situate in Webster County, West Virginia, of comparable value, that are underassessed.

Mr. Ronald Mullanex, the expert for East Kentucky Energy, testified that other tracts in the area have the same geological strata, but that he did not have any knowledge of proven reserves on those "comparable" tracts.

(Res. Br. p. 24a) Mullanex further testified that the proven reserves on the East Kentucky Energy properties were *at least* thirty-two million (32,000,000) tons of low sulfur coal that were recoverable by the strip mining method alone. (Res. Br. in Opp. p. 21a)

Mullanex's testimony clearly refutes petitioner's claim that the valuation of its property is not based upon any "arguable differences" between the petitioners' property and adjacent or contiguous tracts. A known and confirmed mineral estate is worth substantially more than a property which might have some speculative mineral content of unknown extent or quality. The willingness of one of the petitioners to purchase its tracts at a market price of $24 million in 1974 bears irrefutable witness to the fact that the "dramatic disparity" in valuation between the subject property and contiguous tracts results from the petitioners' acute and highly refined judgment of the value of known coal reserves, and not from any failure or default of the county assessor.[2]

Neither of the protesting taxpayers offered competent testimony through appraisers, or similar experts, as to the true and actual values of the comparable tracts. The record is devoid of any evidence to establish that these alleged "comparable" tracts were not assessed at true and actual value. The statistical data submitted by the protesting taxpayers was a mere compilation of the values on the land books without regard to the location, topography, accessibility or other factors (especially proven coal reserves) that may affect market value.

[2]Interestingly, the property was sold for $100,000 in the immediately preceding sale in 1969. (Exhibit L, Feb. 12, 1985, Hearing before the County Comm'n, p. 47.)

Close analysis of Exhibits B and C (Pet. Br. p. 22a), a chart of the *allegedly* "comparable" tracts, reveals that petitioners are comparing apples and oranges.[3]

First, the petitioners' compilation of tracts that make up their 7000 plus acres of property in Webster County are themselves (through the operation of the free market) of dramatically different value. Thus, the use of an "average" assessment is in itself, misleading. If one were to compare the Eastern tract of 21.5 acres, fee valued at $11,860.00 ($551.63 per acre) with the Oneida 15 acres, valued at $8,400.00 ($560.00 per acre) with one of the truly comparable pieces of property, the 13.5 acre tract valued at $7,444.85 ($551.47 per acre), the values are comparable.

[3]Interestingly, Exhibits B and C also bears witness to the fact that the assessor revalued "comparable" properties on recent sales occurring between 1975-85. If this were not the case the comparable properties would have only undergone a percentage increase of thirty percent, as those properties not the subject of a recent sale were subject to increases of ten percent on three separate occasions. All of the properties reflect increases in valuation at a greater percentage than 30 percent. Thus, the properties considered comparable by the petitioner were valued by the assessor at that value that the market would bear—as was the petitioner's. The fact that the market would create values of property dramatically different is a reflection of the difference in "actual value" of the property. If the value of these "comparable properties" were in fact found to be worth the value that East Kentucky's property was worth, it is likely that the owners of the "comparable properties" would have opted to sell to a buyer who would pay the higher price, especially where the difference in the price of properties is a factor of millions of dollars.

It is patently ludicrous for petitioners to compare a 13.5 acre tract (upon which no evidence is offered as to coal reserves) with their total acreage of 7287, especially where one portion of that property has proven reserves of 32,000,000 tons of high priced low sulfur coal recoverable by strip mining methods alone. If there was *any* coal on the 13.5 acre tract—a fact *not* established by petitioners—it still would not be comparable because the initial fixed costs of mining would be spread over smaller coal reserves.

The superficial comparison by petitioners of property values is insufficient to prove disparate traeatment where there is no proof that the alleged "comparable" properties were not valued at true and actual value. This case falls squarely within the parameters of *Coulter,* 196 U.S. 599. No clear evidence of underevaluations of others' properties has been shown.

C. The Assessor's Actions Were A Rational And Systematic Methodology To Establish Property Valuations In A Nondiscriminatory Manner.

The assessor's method of valuing property reflects a rational attempt to determine, with limited resources, the true and actual value of real property in Webster County, in accordance with provisions of the West Virginia Code, and in a manner that resulted in neither intentional nor systematic discrimination.[4]

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[4]The assessor's duties are set forth in Section III, herein.

The assessor rationally and systematically utilized three mechanisms in determining the true and actual property value.[5] First, she revalued property when presented with the best evidence of its true and actual value—an arm's-length transaction. She considered information from the Tax Commissioner, but determined that it was inapplicable.[6] Second, she increased the valuation of property that had been improved. (Tr. Feb. 12, 1985, Hearing before the County Comm'n, p. 47) Finally, she made three separate increases of ten percent each on property that had not been recently involved in an arm's-length transaction. The ten percent increases were made based on her knowledge of local conditions and her estimate of the amount of increase necessary to bring the valuation of property that had not been recently sold into alignment with the value of those properties that had been recently sold.[7] (Tr. Feb. 12, 1985, Hearing before the County Comm'n, p. 22.)

The fact that experts may differ as to whether these acts reflected a system of perfect valuation is not re-

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[5]It is well established that mere differences in modes of assessment do not deny equal protection. *Bell's Gap R.R. Co. v. Pennsylvania,* 134 U.S. 232 (1890).

[6] "One year we got [a list from the Tax Commissioner of coal properties in the three districts of Webster County]. . . . We were told the value was for one seam only and that was for the cheapest seam . . . If those things had been true there wouldn't have been [anyone] mining coal. So, she, [a representative from the Tax Department who was a mineral specialist] said that the way we were doing it by using the sale value, [was] proper." (Tr. Feb. 12, 1985, Hearing before the County Comm'n, p. 30.)

[7]Her efforts reflect a continuing effort to reappraise property. Thus, the case is analogous to situations where an assessor makes a partial reappraisal which results in some property receiving higher rates than others. Courts have rather uniformly rejected equal protection and uniformity of taxation arguments in such cases.

(Continued on following page)

motely indicative of intentional and systematic discrimination. The true and actual value of property is subject to a myriad of market, economic and logistical factors. The value of property in all cases, except where an actual market transaction has occurred, is a matter of opinion and individual estimate. As observed in *Weil v. Supervisor of Assessments,* 266 Md. 238, 254, 292 A.2d 68, 76 (1972), "[v]aluation of land is not an exact science. Experts nearly always differ as to their opinion of fair market value."

The critical determination is not whether this system created perfect valuations, but whether there was intentional and systematic discrimination. The actions of the assessor reflect an effort to accomplish just the opposite.

This was not a case where there was intentional and systematic discrimination, but where the assessor acted within her capacity, as dictated by the West Virginia Code, to avoid discrimination. It was the assessor's duty under the Code to increase assessments for that property where

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In *In re Hawaiian Land Co.,* 53 Hawaii 45, 487 P.2d 1070 (1971) appeal dismissed sub nom. *Hawaiian Land Co. v. Director of Taxation, State of Hawaii,* 405 U.S. 907 (1972), the Hawaiian Supreme Court found that it was not a violation of the equal protection clause where an assessor selected certain properties to be valued annually while others were valued every two or three years. In *Justus v. Bd. of Equalization,* 101 Idaho 743, 620 P.2d 777 (1980), the Idaho Supreme Court found no equal protection or uniform taxation problem where piecemeal reappraisals were made over a period of time with property being assessed at the new appraisal figure instead of waiting until all property had been reappraised. This same result was reached in *Recanzone v. Nevada Tax Comm'n,* 92 Nev. 302, 550 P.2d 401 (1976). See also *Melvin v. Dunn,* 607 P.2d 694 (Okla. 1980); *State ex rel. Fort Howard Paper Co. v. State of Wisconsin Lake District Bd. of Review,* 82 Wis.2d 491, 263 N.W.2d 178 (1978); Annot., 76 A.L.R.2d 1077 (1961).

true and actual values had increased as shown by the purchase price arising from an arm's-length transaction. See W. Va. Code § 11-3-1. Further, the Code mandated that the assessments be increased where the property had been improved. See W. Va. Code § 11-3-3a. To equalize values on property that had not been revalued by virtue of a recent sale, three separate increases were applied. These increases were consistent with her opinion as to the level of inflation during the period in dispute, 1975 to 1985. (There was no evidence presented as to what adjustments were made between the last statewide reappraisal, in 1965, and 1975.) The question that remains is whether the actions of the Webster County assessor in raising the value of property that had not been recently transferred, by 331.1 percent was reasonable. In the time frame of this case, 1975-86, the general market increase in property values in the relevant classification, gross private domestic investment-nonresidential property, was 41.2 percent.[8] Thus, the actions of the assessor reflect a close adherence to actual market changes. The small deviation can be explained by numerous factors.[9]

The assessor's actions must be examined in light of the presumption of validity and good faith in the actions of taxing officials. In *Meyer v. Cuyahoga County Bd. of Revision,* 58 Ohio St. 2d 328, 390 N.E.2d 796 (1979), the Supreme Court of Ohio held that fixing of the true value

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[8]Source: 1988 *Statistical Abstract of the United States,* Table No. 733, Fixed-Weighted Price Indexes: 1970-1986 at p. 446.

[9]The fact that the increases were periodic rather than yearly could cause the actual figure to hit the exact mark if, for example, the assessor were to have increased values by another 10 percent in 1987.

of a parcel of real estate separately and between reappraisals for tax purposes does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, nor the uniform rule as provided in Section 2, Article XII of the Ohio Constitution. In so holding, the court noted that the fair market value of property for tax purposes is a question of fact, primarily to be determined by the taxing authorities. The court recognized that:

> The system of taxation unfortunately will always have some inequality and nonuniformity attendant with such governmental function. It seems that perfect equality in taxation would be utopian, but yet, as a practicality, unattainable. We must satisfy ourselves with a principle of reason that practical equality is the standard to be applied in these matters, and this standard is satisfied when the tax system is free of systematic and intentional departures from this principle.

In consideration of all these factors, the actions of the assessor were not incompatible with a fair system of property valuation, and were not discriminatory or violative of the Equal Protection Clause. See *May Department Stores*, 308 S.W.2d 748.[10]

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[10]Assessor's actions are clearly distinguishable from those cases cited by petitioner. Specifically, *Ernest Hahn, Inc. v. County Assessor*, 92 N.M. 609, 592 P.2d 965 (1978) concerned a case where the taxpayer was singled out for selective enforcement in that it was reappraised four times during an eight year period of an unscheduled continuous reappraisal program while ninety percent of the property did not undergo a single reappraisal. In *Sparks v. McCluskey*, 84 Ariz. 283, 327 P.2d 295 (1958) the assessor selectively applied a new formula to determine value on certain streets. In *Duval v. City of Manchester*, 286 A.2d 612 (N.H. 1971) the disparate treatment was, in part,

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D. The Uniform Reliance By The Assessor On Recent Sales As An Indicator Of Value For Assessment Purposes Whenever These Were Available Was Not In Violation Of The Equal Protection Clause.

The use of recent sales as an indicator of value has been upheld in numerous cases throughout the nation. The use of such sales by the Webster County assessor to revalue petitioner's property was in compliance with the West Virginia Code, supported by the holding below and likewise not violative of the Constitution.

The statutory valuation system adopted by the West Virginia Legislature is similar to that of the majority of states. This system of valuation recognizes that property values do not remain constant, and mandates the valuation of real estate by the most ideal and realistic indicator of true and actual worth—market value. There is an abun-

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caused by the fact that property had not been reappraised for as much as forty years. In *Board of Assessors of Weymouth v. Curtis*, 375 Mass. 493, 378 N.E.2d 655 (1978) the assessor revalued only if improvements were made.

The assessor, in the present case, did not single out a taxpayer for selective enforcement, nor use just one method of adjustment (such as in *Weymouth*) but used three methods to insure that values on property were in alignment.

In *Nashville, Chattanooga & St. Louis Railway v. Browning*, 310 U.S. 362, 368 (1940) the Court stated:

"This Court has previously had occasion to advert to the narrow and sometimes cramping provision of these state uniformity clauses, and has left no doubt that their inflexible restrictions upon the taxing powers of the state were not to be insinuated into that meritorious conception of equality which alone the Equal Protection Clause was designed to assure."

dance of authority to support the contention that an arm's-length transaction is the best indicator of value. In *State ex rel. Lincoln Fireproof Warehouse Co. v. Board of Review,* 60 Wis. 2d 84, 208 N.W.2d 380 (1973), the Supreme Court of Wisconsin found that a "fair sale" of property is conclusive evidence of the fair market value of such property for tax assessment purposes. The court declared that it was error to utilize other evidence of intrinsic value in assessing property. Likewise, in *Meyer,* 390 N.E.2d 796, the Ohio Supreme Court noted that it had consistently held that the best evidence of true value was the actual sale price of the property in an arm's-length transaction. *See also, State ex rel. Lincoln Fireproof,* 208 N.W.2d 380.

In *Cumberland Coal Co. v. Board of Revision,* 284 U.S. 23 (1931), the Court recognized the merit of utilizing market value. In *Cumberland* the commissioners of the county, sitting as a board of appeal for the revision and equalization of assessments, assigned different values for the coal in different townships of the county, but assessed the coal within the same township at the same value per acre, notwithstanding differences in actual or market value for different coal tracts within the township. The issue before the Court was whether a system of assessing all coal in the same township at the same value regardless of the remoteness or accessibility to market, cost of operation, means of transportation available, or differences in value of the coal, and regardless of whether the coal was virgin coal (as distinguished from "active coal," which is opened and mined), was violative of the Equal Protection Clause. The Court held that the system did violate provisions of the

Equal Protection Clause by virtue of the fact that the system did not recognize differences in actual values.[11]

The petitioner admits that there is nothing inherently wrong with utilizing recent sales as a basis for assessing real property. The petitioner's contention, instead, is that to revalue only property that has been recently sold is a violation of equal protection. It cannot be emphasized strongly enough that the petitioner misstates the facts. The assessor did revalue other property. (See Section IIC, herein) Assuming *arguendo,* however, that no adjustments were made to other properties by assessor, use of recent sales to revalue petitioner's property was proper.

If the assessor had not used her authority to revalue property where there was a clear indication of a "dramatic" increase in value caused by development or an incorrect previous assessment, then a treatment opposite the treatment accorded under the welcome stranger doctrine would have resulted. For example, assume that two pieces of property of equal acreage were valued by the assessor at a time when one piece of property had a home constructed on it, and the other was barren. The assessor valued each piece of property at its actual value; therefore, the first piece was valued at $100,000 while the second piece was valued at $10,000. Thereafter, the second lot was developed to support four homes worth $100,000

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[11]It is of interest to note that the circuit court's decision in this case is violative of the holding of *Cumberland.* The circuit court ordered that petitioner's property be assessed at an estimate provided by the Tax Commissioner as to value per acre. In Webster County this value was to be used as a starting point, not as a conclusive value. Further, the value provided by the Tax Commissioner and used by the circuit court related to a less valuable seam of coal.

each. If an assessor were unable to adjust property values to account for such increases, then the owner of the first lot would be inequitably paying for public services consumed by the new households. An assessor must have the ability to revalue property when presented with undisputed evidence that the property has been developed or is grossly undervalued. Where there is a clear increase in value of property and such property has increased more than land in the surrounding area, state courts of last resort have recognized the need to grant deference to the assessor to account for such increases. *See May Department Stores*, 308 S.W.2d 748.

The property at issue is indicative of the critical need that an assessor revalue when presented with clear evidence through arm's-length transactions that the property warrants revaluation.

Clearly, the petitioner's property either is increased in value because of establishment of "proven reserves," because it had been developed, or because it had been previously grossly undervalued. The mineral resource being taxed was a depletable one. Without a means to revalue the property, the government would have no means of extracting from the owner of the property his share of the costs of governmental services relating to that property. Mineral production is an activity for which the public costs are very high. The production of coal very often results in not only the removal of the mineral in place, but water pollution, land recontouring problems, water table depletion, coal waste disposal and water impoundment problems and land subsidence problems; all of which involve public costs.

E. The Equal Protection Clause Does Not Require The Assessor To Conduct An Extensive County-Wide Reevaluation Merely Because Petitioners' Newly Purchased Property Was Reassessed.

The Equal Protection Clause does not require extensive, expensive, sophosticated valuation systems, nor does it mandate that all property be valued perfectly. Such requirements would place such a heavy burden on state governments that no system of taxation could survive. Instead, the standard is that there be no intentional, systematic discrimination.

The assessor's actions did meet the requirements of the Equal Protection Clause. The West Virginia system provides that when clear evidence is presented to the assessor of the increased value of property, the assessor must recognize such changes. This was done with petitioner's property. However, there was no corresponding duty to perform an exotic and expensive reevaluation of surrounding property merely because petitioner's property was accurately reassessed (contrary to petitioner's assertion). Such a duty would mandate an immediate and unaffordable reappraisal of all properties within the county each and every time a sale of property occurred.

The statutory valuation system, by its nature and practical application, relies on the local assessor's knowledge of local market conditions to determine the value of that property which has not been sold. Unlike the evidence presented by an arm's-length transaction in a recent sale, increases in valuation of property that has not been recently sold are not clearly evident.

As noted in *Shell Oil Co. v. Supervisor of Assessments of Prince George's County,* 278 Md. 659, 366 A.2d 369, 374 (1976), "[n]o one parcel of land is exactly the same as another. Each parcel is unique." Common sense dictates that the increase in the value of one piece of property is not *conclusive* evidence that surrounding property has increased in value.

This rationale is especially applicable in valuing mineral property. The petitioner's own expert indicated that the location of coal deposits varied widely on the subject property. (Res. Br. in Opp. p. 18) Absent expensive mineral exploration procedures, there is no certainty that such coal deposits are present. Obviously, it would be impractical for the assessor to embark upon costly mineral exploration efforts in order to reach some "ideal" value, and such an effort is even less practical if, as the petitioner argues, it should be made every time a property sale occurs within the county. Administrative costs of revaluation is a factor which can be taken into consideration in determining whether the taxing authorities' action meet Equal Protection standards. *See Justus v. Board of Equalization of Kootenai County,* 101 Idaho 743, 620 P.2d 777 (1980).

The assessor did not even have a duty to make a cursory physical inspection of the property and adjacent properties, contrary to assertions by the petitioner. The actual value of the petitioner's property was clearly indicated by the purchase price resulting from the arm's-length transaction. There was no need to evaluate how much coal existed, the quality of such coal or its proximity to transportation. The market has made such distinctions. For the reasons previously mentioned, an inspection of the surrounding properties would have been fruitless, because it would not have resulted in information sufficient for a coal valuation.

III. ANY DISPARITY NOT REFLECTING TRUE AND ACTUAL VALUE RESULTED FROM THE WEBSTER COUNTY ASSESSOR'S APPLICATION OF A CONSTITUTIONAL CLASSIFICATION OF ASSESSMENT PROCEDURES BY THE STATE.[12]

A. The Court Has Adopted A Deferential Standard Of Review In Determining Whether Distinctions Created By A State Legislature Violate The Equal Protection Clause.

This Court has consistently adhered to a deferential standard of review in applying the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution to distinctions created by state taxation leg-

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[12]Petitioners have not, in this Court or below, challenged the constitutionality of the state statutory system. Thus, the issue of the constitutionality of the statutory classification scheme is not before this Court, nor can it be. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). The only equal protection question before this Court is whether the assessor's discretionary acts in this case constituted an intentional and systematic violation of equal protection. These can only be analyzed in the context of the West Virginia statutory classification scheme and it is only for that purpose that it is addressed in this brief.

islation. The distinctions made by the state tax system will be held to rest on a rational basis, and thus not violative of the Equal Protection Clause, if any conceivable state of facts support the distinction. *See Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 509 (1937). It does not impose upon a state any rigid rule of equality of taxation. *Id.* at 495. The test is whether the difference is an invidious discrimination. *See Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973), see also *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). The deference accorded issues regarding state taxation is especially broad.

Where taxation is concerned and no specific federal right apart from equal protection is imperiled, the states have large leeway in making classifications and drawing lines which, in their judgment, produce reasonable systems of taxation.[13]

In *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526 (1959), this Court discussed its standard of review in cases involving state systems of taxation:

> The States have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.

The Court has sustained state taxes even when they have had the collateral effect of destroying an occupation or business. *See Magnano Co. v. Hamilton*, 292 U.S. 40 (1934). The presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. *See Lehnhausen*, 410 U.S. 356.

The deferential standard used to review state tax statutes recognizes the inherent right of a state to control its governmental functions and the fact that the state legislature is better able to address the conditions and circumstances peculiar to that state than any other tribunal, body or entity.

B. West Virginia Has Classified Certain Evaluative Criteria Which Should Be Given Priority Over All Others.

West Virginia has determined that all property subject to ad valorem tax is to be valued at its "true and actual value."[14] The West Virginia Legislature has codified certain procedures and prioritized certain evidence to be used by county assessors in performing this valua-

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[13] *Lehnhausen*, 410 U.S. 356, noted that classic examples of federal rights concerned those created by the First Amendment or Interstate Commerce Clause.

[14] See Constitution of West Virginia, Article X, § 1, Pet. Ap. 70a and W. Va. Code § 11-3-1, Pet. Ap. 76a.

tion.[15] This codification constitutes a constitutional classification related to a combination of legitimate purposes. It, in essence, provides that certain kinds of evidence or data must be considered by an assessor when performing annual valuations. The weight the assessor must give to this evidence is largely, but not entirely, left to the assessor's discretion.

First and foremost, W. Va. Code § 11-4-8 requires an assessor to use the purchase price of recently transferred property to establish true and actual value.[16] This requirement expresses the statutorily mandated preference that relevant cost data generated through an arm's-length transaction be included when establishing the true and actual value of a given taxpayer's property.[17]

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[15]See Constitution of West Virginia, Article X, § 1b, W Va. Code § 11-3-1 *et seq.*, W. Va. Code § 11-4-1 *et seq.*, and W. Va. Code § 18-9A-11.

[16]W. Va. Code § 11-4-8 provides in pertinent part:

"The clerk of the county court [county commission] shall, not later than the tenth day of each and every month, make out and deliver to the assessor a certified list showing all the transfers of title of land made in his county during the preceding month; such list shall show * * * the names of the devisors and devisees, the names of the grantors and grantees, * * * the nature of the estate transferred, the character of interest in the land conveyed, the quantity and location of the land or interest transferred, and, if a part of a tract, of what tract it was a part when the whole tract was transferred, and reference to the book and page showing such transfer. From the list thus furnished, the assessor *shall* make the necessary changes in the land books for the current year, and *shall* value each tract of land or interest therein so transferred, at its true and actual value according to the rule established in this chapter. . . ." (Emphasis added)

[17]Inasmuch as W. Va. Code § 11-3-1 mandates that an assessor value the property at "the price for which such property would sell if voluntarily offered for sale," then *a fortiori* wher

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Reading these statutes in *pari materia,* a reasonable assessor, when confronted with this evidence, must accept arm's-length cost data as the "true and actual value" of the transferred property at the time of the transaction unless she has received other competent evidence to the contrary. Failure to do so would be an arbitrary and capricious act of the assessor.[18]

Second, W. Va. Code § 11-3-3a mandates that the assessor be provided notice of any improvements to real property that exceed $1,000.[19] The weight given to such evidence is left to the discretion of the assessor, but the assessor is specifically authorized by statute to use it.

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confronted with such a "voluntary" sale, the value as set forth in the "declaration of value" constitutes, at the time of the sale, the value at which the assessor should value property. W. Va. Code § 11-4-8 and W. Va. Code § 11-22-6. A failure to file an accurate "declaration of value," when property is purchased, is a crime punishable by imprisonment up to five (5) years and/or a fine of up to $1,000. See W. Va. Code § 11-22-9.

[18]*Kline v. McCloud,* 326 S.E.2d 715 (W. Va. 1984)

[19]W. Va. Code § 11-3-3a provides in pertinent part:

"Any person, corporation, association or other owner of real property, subject to the payment of property tax, who shall hereafter erect any building or structure, or who shall add to, enlarge, move, alter, convert, extend, raze or demolish any building or structure, whereby the value of the said real property shall be improved more than one thousand dollars, shall give notice in writing to the assessor within sixty days after the commencement of the improvement of such property . . . The information contained in such notice shall be advisory in nature and may be used by the assessor in performing his duties as otherwise provided by law. . . ."

Third, W. Va. Code § 18-9A-11(c) mandates that the Tax Commissioner's latest appraisal information be made available to the county assessor on a yearly basis. (Pet. App. p. 82a.) While an assessor may take this appraisal information into consideration, the subsequent price paid for property in an arm's-length transaction may not be rejected in favor of it.[20]

It is the general duty of an assessor, using the statutory methods and criteria set out above, to assess all property based on its true and actual value on July 1 of each year. There is no statutory list of any other evidence or criteria which should be given priority by assessors in the exercise of their professional discretion.

As applied, assessors do not crisscross the county each July 1, reevaluating all property. Rather, the assessor generally evaluates market trends and makes general adjustments in property value. This application of the statute reflects the fact that assessors do not possess the needed resources or expertise to perfectly evaluate each piece of property annually, especially when such reevaluation would require core drillings and assessment of mineral reserves.

This statutory prioritization of evaluative evidence and criteria is state policy and constitutes a constitutionally permissible classification scheme. It classifies, on one hand, evidence that cannot or should not be ignored by the county assessor and the Board of Equalization and Review, and on the other hand, all other criteria and evidence which are left to the discretion of the assessor.

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[20]*Kline*, 326 S.E.2d 715.

C. This Classification Is Rationally Related To A Number Of Legitimate But Competing Public Purposes.

The distinctions created by West Virginia's taxation legislation are rationally related to the furtherance of the legitimate public pupose of obtaining tax revenues needed for county governments and school districts;[21] while at the same time assuring compliance with equal protection between taxpayers and due process between the state and the individual taxpayers.[22]

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[21]Pursuant to 11-8-6b, county commissions' maximum levy rates are as follows: Class I property, 11.9 cents; on Class II property, 23.8 cents; Class III and IV property, 47.6 cents; per hundred dollar valuation.

Pursuant to 11-8-6c, county boards of education maximum levy rates are as follows: Class I property, 21.1 cents; Class II property, 42.2 cents; Class III and IV property, 84.4 cents; per hundred dollar valuation.

[22]Under the Fourteenth Amendment, "due process" emphasizes fairness between the state and the individual dealing with the state, regardless of how other individuals in the same situation may be treated; "equal protection," on the other hand, emphasizes disparity in treatment by a state between classes of individuals whose situations are arguably indistinguishable. *Ross v. Moffitt*, 417 U.S. 600 (1974).

1. **In furtherance of the first purpose, West Virginia has a system that is designed to insure that whenever a property increases in true and actual value, if inexpensive and reliable evidence of that value is available, it is used. This purpose can be restated as an attempt to realize maximum legitimate tax revenue per administrative cost.**

The declaration of consideration of an arm's-length transaction constitutes historical cost data that is highly probative of the true and actual value of that property at the time of the transfer. A statutory system that directs the assessor to include *all* such data for *all* property is not only reasonable, it comports with general accounting principles.[23]

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[23]"Accounting has traditionally accepted historical cost as the primary measurement base, in spite of serious challenge from various fronts, such as the Securities and Exchange Commission, which currently requires the disclosure of some current value information. A major defense of historical cost is that it represents prima facie evidence of the objectively determined value of resource or obligation. At the time of acquisition, historical cost is the same as current market value at a point in time as suggested by an arms-length transaction. Because the measure of value is determined by an exchange transaction, it can be measured independently (*i.e.*, it is verifiable), and provides a degree of objectivity often lacking in other measurement bases. The emphasis on objectivity determined values supports the historical cost concept of income determination, which generally recognizes changes in value only if they are evidenced by an exchange transaction (*i.e.*, a new historical cost or acquisition price is established).

"Historical cost is also supported on the grounds that it has a utility for predictive purposes. The relevance of historical costs to certain types of future economic decisions, including those which involve future predictions, is established in the literature." [Footnote omitted] Fischer, Taylor, Lee *Advanced Accounting*, pp. 9-10 (1st ed. 1978).

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Thus, the Webster County assessor was implementing a statutory system reasonably designed to insure that all increases in true and actual value must be taxed whenever there is evidence of such increase.

2. **The classification system is also designed to satisfy the requirements of equal protection.**

When property valuations are adjusted for inflation (as anticipated by the statutory scheme and done by the assessor, below), there will be no systematic discrimination between property recently sold and that which was not sold. Any differences in true and actual value would result from specific differences between tracts. Specific facts that might result in such differences, such as whether or not there is a proven underground reserve of mineable coal, are often not reasonably discoverable by an assessor, except as reflected in a recent sales transaction.

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"The cost principal is a pervasive concept that affects most aspects of financial accounting. *Cost* (or *historical cost*) is assumed to be the proper basis of accounting for assets acquired, for services received, and for the interests of creditors and owners of a business entity. . . . At the time of the transaction, the exchange price usually represents the current fair value of the goods or services exchanged as evidenced by the agreement of an informed buyer and seller." Meigs, Mosich, and Johnson, *Intermediate Accounting*, p. 16 (4th ed. 1978).

"Why are assets and services recorded at cost? The answer is that accounting must be factual and costs are factual. When costs are used, a buyer and seller, each trying to strike the best bargain for himself, establish the costs; and these 'bargained costs' are normally a fair measure of the goods and services acquired. If amounts other than costs were used, for example, accounts based on estimates, judgments, and appraisals, accounting records would lose much of their usefulness." Pyle & White, *Fundamental Accounting Principles*, p. 9 (7th ed. 1975).

A rational and administratively sound decision to uniformly and systematically forego exotic and expensive evaluation techniques which are not mandated by statute, such as core drillings used to determine whether proven reserves of mineable and merchantable coal might be present in each parcel of property, would be an exercise of discretion left to the assessor by West Virginia's statutory scheme. As discussed in Section II herein, the uniform unavailability of such data is not discriminatory and therefore not violative of equal protection.

Further, the statutory scheme under which the assessor acted subjects all properties to the same evaluative criteria. All properties are assessed as true and actual value.

All properties are appraised and assessed taking into consideration any evidence of changed value, such as recent deed values.

All taxpayers, believing their property to be overvalued or their neighbor's property to be undervalued, have standing to challenge that valuation.[24]

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[24]See the holding of the West Virginia Supreme Court of Appeals below, Pet. Ap. 8a, 9a, where they stated in relevant language:

"Any dispute the appellees have with the assessments of other landowners in Webster County may be presented to the board of review. '[A]*ny* person who is aggrieved by *any* assessment shall have the right to appeal that assessment (if they have appeared and contested the valuation before the Board of Equalization and Review).' *Tug Valley Recovery Center, Inc. v. Mingo County Comm'n*, 164 W. Va. 94, 101, 261 S.E.2d 165, 170 (1979). (emphasis in original).

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If, after a hearing, it is determined on sufficient competent evidence that in a particular instance the valuation was inaccurate, under West Virginia law, the erroneous valuation not only can, but must be corrected.[25]

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"In *Tug Valley, supra,* we found support for this position in both *W. Va. Code,* 11-3-25, which holds, in part:

'Any person claiming to be aggrevied by any assessment in any land or personal property book of any county who shall have appeared and contested the valuation or whose assessment has been raised by the county court [county commission] above the assessment fixed by the assessor, or who contested the classification or taxability of his property may, at any time up to thirty days after the adjournment of the county court [county commission], apply for relief to the circuit court of the county in which such books are made out . . .

and *W. Va. Code,* 18-9A-11 which holds in part:

'In the event the county commission shall fail or refuse to make the reallocation of levies as provided for herein, the county board of education, the tax commissioner, the state board, or any other interested party, shall have the right to enforce the same by writ of mandamus in any court of competent jurisdiction.

'We concluded that' [t]his language makes it clear that 'any interested party' is allowed to compel proper assessment of all real estate in his home county. . .' *Tug Valley, supra,* at 101, 261 S.E.2d at 170.

'We addressed the very question raised by appellees in *Killen, supra,* and held at —, 295 S.E.2d at 709: 'In the future, taxpayers who claim that they are being overassessed in relation to other taxpayers may not have their assessments reduced *as long as their property is valued at market value.* Instead, they should seek to have the assessment of other taxpayers raised to market value.' (emphasis added)."

[25]W. Va. Code § 11-3-25 states in relevant part: "If it is ascertained that any property is valued too low the circuit court shall, by an order entered of record, correct the valuation and fix it at its true and actual value." (Pet. Ap. p. 79a.)

3. Finally, the State's assessment system is a rational means of assuring that there is fairness between the state and the individual taxpayer dealing with the state.

West Virginia recognizes that each parcel of land is unique. See *Shell Oil*, 366 A.2d 369. Rather than encourage large or reckless increases in the assessed value of property which was presumed to have been accurately assessed in the previous tax year, W. Va. Code § 11-2-2a specifically provides that "if the assessor determines the assessed valuation of any item of real property is more than ten percent greater than the valuation assessed for this item in the last tax year . . . the assessor shall give notice of the increase to the person assessed . . . ."

This procedure protects the right of the individual taxpayer not to have his property valuation increased without due process.

As discussed in Section II, the mere fact that one property adjoins another that is assessed significantly higher, is not sufficient to sustain a conclusion that it has the same or similar true and actual value. Nor would reliance on only such evidence sustain a due process challenge by an individual taxpayer whose tax burden was increased only because of such facts.

The class of evidence which, according to West Virginia's statutory scheme, must be given priority by an assessor is small and includes only highly probative and reliable indicia of true and actual value. This restraint protects the rights of individual taxpayers under the due process clause of the Fourteenth Amendment.

IV. THE REMEDY SOUGHT BY THE PETITIONER SHOULD NOT BE ADOPTED IN THE PRESENT CASE.

A. Where No Systematic and Intentional Discrimination Exists, The Holding That a Taxpayer is Not Entitled to a Reduction of His Assessment But May Object to Other Taxpayers' Value to Achieve More Perfect Equality Does Not Violate the Equal Protection Clause.

The court below found that there was no evidence of intentional and systematic discrimination. The court went on to state that even if it had been found that the petitioner had been a victim of such discrimination by the acts of the Webster County assessor, the court enunciated the appropriate remedy: to raise other taxpayer's taxes in accordance with appropriate valuation. This holding recognizes that there is nothing inherently wrong in forcing a taxpayer to pay his fair share, especially where the assessor implemented valuation increase in order to equalize property valuations within the county.

In *State Tax Comm'n v. Brandt Cabinet Works*, 202 Md. 533, 97 A.2d 290, 295 (1953), the Maryland Supreme Court held:

> Perfect equality is unattainable. If assessments could be upset by comparison of a few widely different properties, on the basis of a selected few of the many elements or evidences of value, no assessment could stand. . . . Every taxpayer has a financial interest in seeing that all property in the state, properly the subject of taxation, should be taxed, because, by increasing the taxable basis, the rate necessary for the production of the expenses of the state and local governments will be reduced, and the individual's tax correspondingly lowered.

The West Virginia Court has previously fashioned a remedy of lowering taxes where a taxpayer was intentionally singled out. In *In re U.S. Steel Corp.*, 268 S.E.2d 128 (W. Va. 1980), the court held that the assessor acted arbitrarily and capriciously when he fixed the assessed value of U.S. Steel's property at 108 percent of its appraised value but assessed other coal companies' property at 68 percent over value assigned by them in their reports. The court found that this was not a sporadic deviation from the system, but a negation of the system, because there was evidence of knowing, active discrimination against the steel company. The court held that where there was *intentional* discrimination against the taxpayer, by knowingly applying a different formula to the computation of its taxes from that generally used for *all* other taxpayers in similar circumstances, the taxpayer is entitled to have its taxes computed in the same manner and on the same basis as the favored taxpayers.

To this extent, *In re U.S. Steel Corp.* resembled the situation in *Sioux City*, 260 U.S. 441.

In *Sioux City* the Court held that where there is *intentional* and systematic valuation at different percentage rates of other property in the same class, the remedy is for the taxpayer to have its taxes assessed at the same rate in the same manner as the other taxpayers.

The case before the Court is clearly distinguishable. The petitioner was not singled out. All property was valued by using available evidence of recent transactions and thereafter uniform rates were applied.

The facts of *Sioux City* are further distinguishable. Even where there is not intentional and systematic discrimination, there is available, in West Virginia, a statutory procedure to secure an increase in the assessment

of an adjacent property that may be undervalued. Under West Virginia law, sufficient and credible evidence of "comparable" value or of undervaluation will sustain a judicial finding that a property or properties have been undervalued and should be increased. West Virginia law not only provides standing to petitioners to challenge specific suspect valuations, it provides that the circuit court must increase any undervaluations and therefore increase their assessment.[26]

B. Assuming, Arguendo, That All Of Petitioner's Arguments Are Correct, The Only Appropriate Remedy Is To Remand The Case To State Court For The Fashioning Of A Constitutionally Permissible Remedy.

The gist of petitioner's argument is that the remedy fashioned by the West Virginia Supreme Court of Appeals impermissibly shifts the burden to petitioners to seek to have others' taxes increased. The remedy allegedly violates the Constitution because the *burden* for raising the taxes rests upon the petitioner. The Court noted in *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931) that the taxpayer "cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." *Id.* at 247. Assuming, *arguendo*, that petitioners are correct, then the remedy fashioned by the state court violates the Fourteenth Amendment. This Court need not fashion a remedy because other remedies are possible through utilization of state law.

Several possible remedies could be fashioned by the state court utilizing state statutes. For example, W. Va.

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[26]See Footnote 25.

Code § 11-3-1 provides that in the event assessor fails in his duty, then the State Tax Commissioner may take over the tax responsibilities in that particular county. (Pet. Ap. p. 76a) Additionally, the assessor could be ordered to reassess all the property. *See State ex rel. Rose v. Fewell*, 294 S.E.2d 434 (W. Va. 1982). The West Virginia Supreme Court of Appeals could order implementation of the statewide reappraisal as provided for in the 1982 Amendment to the West Virginia Constitution.

It is well settled that "the Court will not pass upon a (federal) constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936) (Brandeis, concurring).

> Although federal courts generally have a duty to adjudicate federal questions properly before them, this Court has long recognized that concerns for comity and federalism may require federal courts to abstain from deciding federal constitutional issues that are entwined with the interpretation of State law. *Brochett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985) (O'Connor, concurring).

Accordingly, this Court can avoid enumerating a constitutionally mandated remedy by remanding the case back to state court to allow the state court to fashion a remedy through the utilization of state law in accordance with the appropriate federal standard. This is the only appropriate holding. *Rescue Army v. Municipal Court*, 331 U.S 549 (1947).

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CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Appeals that the petitioners' properties were assessed in accordance with the Equal Protection Clause of the United States Constitution should be affirmed.

Respectfully submitted,

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